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In the Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL, APPELLANT

v.

BOSSIER PARISH SCHOOL BOARD

GEORGE PRICE, ET AL., APPELLANTS

v.

BOSSIER PARISH SCHOOL BOARD

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF ON REARGUMENT FOR THE FEDERAL APPELLANT

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QUESTIONS PRESENTED ON REARGUMENT

1. Does the purpose prong of Section 5 of the Voting Rights Act of 1965 extend to a discriminatory but non-retrogressive purpose?

2. Assuming arguendo that Section 5 prohibits the implementation of a districting plan enacted with a discriminatory, non-retrogressive purpose, does the government or the covered jurisdiction bear the burden of proof on this issue?

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ARGUMENT

I. SECTION 5 OF THE VOTING RIGHTS ACT OF 1965 BARS IMPLEMENTATION OF A NEW VOTING PRACTICE ENACTED WITH A RACIALLY DISCRIMINATORY PURPOSE, EVEN IF THE NEW PRACTICE IS NOT RETROGRESSIVE IN PURPOSE OR EFFECT

In our original opening and reply briefs, we explain that Section 5 of the Voting Rights Act of 1965 (Act), 42 U.S.C. 1973c, prohibits the implementation by a covered jurisdiction

of any new voting practice enacted with the purpose of discriminating on the basis of race or color. That prohibition is not limited to changes enacted with an intent to worsen the voting strength of a minority group. This conclusion follows from the language of Section 5 (Opening Br. 18),[1] the legislative history of its enactment in 1965 and its reenactments in 1970, 1975, and 1982 (*id.* at 20-24), and this Court's decisions (*id.* at 24-29), especially *City of Pleasant Grove* v. *United States*, 479 U.S. 462 (1987); *Busbee* v. *Smith*, 549 F. Supp. 494 (D.D.C. 1982), aff'd mem., 459 U.S. 1166 (1983); and *City of Richmond* v. *United States*, 422 U.S. 358 (1975). To those points we add the following:

A. The text of Section 5 establishes that a new voting practice that has a discriminatory, albeit nonretrogressive, purpose, may not be implemented. Section 5 provides that a covered jurisdiction may implement a new voting practice if it obtains a declaratory judgment from the United States District Court for the District of Columbia that the practice "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. 1973c. A "purpose * * * of denying or abridging the right to vote on account of race or color" plainly includes a purpose to perpetuate an existing situation because it denies or abridges black citizens' right to vote, and to resist further black enfranchisement. For example, a new voting practice intended to prevent the registration of black citizens who had previously been prohibited from voting, or to keep new black registration to the minimum possible, would have the purpose to deny or abridge black citizens' right to vote on account of their race or color, even if that voting change was not designed to reduce black voter

[1] "Opening Br." refers to our principal brief on the merits filed in March 1999; "Appellee Br." refers to appellee's brief on the merits filed in April 1999.

participation further. Such a voting practice could not be precleared, for it would not be a practice that "does not have the purpose * * * of denying or abridging the right to vote on account of race."

None of that language suggests a limitation barring preclearance only of new practices with a retrogressive purpose. Appellee suggests (Appellee Br. 18) that the limitation to retrogression is found in the statutory phrase "denying or abridging." A reading of "denying or abridging" as limited to retrogression is untenable, however, in light of the structure of the Voting Rights Act as a whole, including other provisions where the same phrase is employed but where no limitation to retrogression may be found.

For example, Section 3(c) of the Act, 42 U.S.C. 1973a(c), establishes a preclearance procedure similar to that in Section 5 for jurisdictions where a court has found a violation of the right to vote guaranteed by the Fourteenth and Fifteenth Amendments justifying equitable relief. Under Section 3(c), the court may order such a jurisdiction not to implement any voting change unless the court or the Attorney General concludes that the new practice "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. 1973a(c). Yet Section 3(c)'s bar on implementation of new voting practices that have a purpose "of denying or abridging the right to vote on account of race or color" clearly is not limited to changes with a retrogressive purpose; if it were so limited, then a jurisdiction that was adjudicated to have engaged in intentional discrimination could simply implement a new voting practice with the intent to perpetuate the same discrimination.[2] Similarly, Section 2 of the Act, as

[2] See H.R. Rep. No. 439, 89th Cong., 1st Sess. 23 (1965) (Section 3(c) intended "to insure against the erection of new and onerous discriminatory voting barriers by State or political subdivisions which have been

originally enacted, see 42 U.S.C. 1973 (1970), prohibited the application of any voting qualification "to deny or abridge the right of any citizen of the United States to vote on account of race or color." Yet neither Congress nor this Court has ever suggested that Section 2's prohibition against voting practices that "deny or abridge the right * * * to vote on account of race or color" was limited to retrogressive voting practices.[3]

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found to have discriminated"); S. Rep. No. 162, 89th Cong., 1st Sess. Pt. 3, at 20 (1965) (similar); 111 Cong. Rec. 10,726 (1965) (remarks of Sen. Tydings) (Section 3(c) aimed at state practices "designed to limit exercise of the franchise in an effort to freeze the present Negro-white registration disparity created by past violations of the 15th amendment"). The Department of Justice applies both the purpose and effect prongs of Section 3(c) in a manner consistent with our position on Section 5, *viz.*, as prohibiting enforcement of new voting practices that have a discriminatory purpose (whether or not retrogressive) or will have a retrogressive effect. See 28 C.F.R. 51.8.

[3] Since its amendment in 1982, Section 2 has prohibited the enforcement of any voting practice "which results in a denial or abridgement of the right * * * to vote on account of race or color." 42 U.S.C. 1973(a) (1994). This Court has never suggested that the phrase "denial or abridgement" in amended Section 2 refers to retrogression.

Although Section 2 and Section 5 have some language in common, the two provisions do operate quite differently in several respects. First, Section 5 applies only to new voting practices enacted or administered in certain States and political subdivisions that fall within the coverage formulas of Section 4 of the Voting Rights Act, see 42 U.S.C. 1973b; 28 C.F.R. Pt. 51 App.; *Lopez* v. *Monterey County*, 119 S. Ct. 693, 697 (1999), whereas Section 2 applies to all voting practices, old and new, and to the entire country. Second, Section 5 prevents a covered jurisdiction from implementing a new voting practice unless it has been precleared by the Attorney General or the United States District Court for the District of Columbia, whereas Section 2 places no obligation on the part of a State or any political unit to obtain preclearance of its voting practices. Third, a plaintiff challenging a voting practice under Section 2 has the burden of proving its invalidity, see *Thornburg* v. *Gingles*, 478 U.S. 30, 46, 51 (1986), whereas Section 5 places the burden on the covered jurisdiction to show

Appellee's argument is based fundamentally on a serious misapprehension of what this Court decided in *Beer* v. *United States*, 425 U.S. 130 (1976). In *Beer*, this Court did not decide that the phrase "denying or abridging the right to vote," as used in Section 5, refers only to retrogression. *Beer* held, rather, that the term "effect," as used in Section 5, is limited to precluding enforcement of new voting practices that further impair the voting strength of minorities. See *id.* at 141 ("It is thus apparent that a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the *'effect'* of diluting or abridging the right to vote on account of race within the meaning of § 5.") (emphasis added).

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that preclearance is warranted, see pp. 14-25, *infra*. Fourth, a showing of retrogression (as that concept has been developed under the effect prong of Section 5) is neither necessary nor sufficient to establish a violation of Section 2. As noted above, a violation of Section 2 may be established by showing that the challenged practice "results in" the denial or abridgment of the right to vote on account of race or color, and that "results" standard is met if the plaintiff shows that the "political processes leading to nomination or election * * * are not equally open to participation" by minorities. See 42 U.S.C. 1973(a) and (b). The "results" standard of Section 2 is not the same as retrogression; a voting change may violate Section 2 but not cause retrogression, and *vice versa*. Finally, since its amendment in 1982, Section 2 has not required that the plaintiff show that the jurisdiction acted with discriminatory intent. See *Thornburg* v. *Gingles*, 478 U.S. at 44. Thus, under Section 2, a plaintiff challenging a voting practice may prevail if he shows that the challenged practice violates the "results" standard (whether or not the practice is intentionally discriminatory, and whether or not it is retrogressive), whereas under Section 5, a covered jurisdiction obtains preclearance if it shows that the new voting practice is not intentionally discriminatory, and will not have a retrogressive effect. None of the differences between Section 2 and Section 5, however, turns on possible differences in the meaning of "deny or abridge the right to vote" as used in the two Sections.

As we have explained (Opening Br. 29-31), the Court's interpretation of "effect" in Section 5 in *Beer* reflected concerns about how far Congress intended Section 5's effect prong to reach beyond the Constitution itself. The Court observed that, under the district court's application of Section 5 in *Beer* (which this Court rejected), Section 5's effect prong would, as a practical matter, have been transformed into a statute prohibiting all new voting practices with a disparate impact on minorities. See 425 U.S. at 136-137 & n.8; cf. *id.* at 143-144 (White, J., dissenting) (arguing that Section 5 required "new electoral districts [to] afford the Negro minority the opportunity to achieve legislative representation roughly proportional to the Negro population in the community"). Almost simultaneously with *Beer*, however, the Court concluded that proof of a violation of the Equal Protection Clause of the Fourteenth Amendment requires a showing of discriminatory intent, and that the Clause does not prohibit state action with only a disparate impact on racial minorities. See *Washington* v. *Davis*, 426 U.S. 229 (1976). The purpose prong of Section 5 raises no such questions about Congress's intent to reach beyond the Constitution, however, because the purpose prong reaches only new voting practices enacted with invidious intent, and therefore precludes enforcement only of new voting practices that violate the Constitution itself. Cf. *Chisom* v. *Roemer*, 501 U.S. 380, 416-417 (1991) (Scalia, J., dissenting) (observing that "intentional discrimination in the election of judges, whatever its form, is constitutionally prohibited, and the preclearance provision of § 5 gives the Government a method by which to prevent that").

Beer did refer to Congress's "desire[] to prevent States from 'undo[ing] or defeat[ing] the rights recently won'" by black citizens as a basis for its holding. See 425 U.S. at 140 (initial brackets added). The *Beer* opinion did so, however, in the context of explaining why Congress had required

covered jurisdictions to demonstrate to the Attorney General or the district court "that the [voting] change does not have a discriminatory *effect*," *ibid.* (emphasis added)—not why Congress had prohibited enforcement of new voting practices with a discriminatory purpose, which, the Court noted, was not at issue in that case, see *id.* at 136 n.7.[4] Further, the *Beer* opinion expressed no doubt that even an ameliorative change might be denied preclearance if it "so discriminates on the basis of race or color as to violate the Constitution," *id.* at 141; see *id.* at 142 n.14 ("It is possible that a legislative reapportionment could be a substantial improvement over its predecessor in terms of lessening racial discrimination, and yet nonetheless *continue so to discriminate* on the basis of race or color as to be unconstitutional.") (emphasis added).[5]

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[4] Moreover, as the Court explained in *City of Rome* v. *United States*, 446 U.S. 156, 177 (1980), Section 5's prohibition against implementation of voting changes with a retrogressive effect reaches those situations where, even though invidious intent might not be readily discerned, there is nonetheless a demonstrable "risk of purposeful discrimination" by a covered jurisdiction.

[5] It is of course true that Section 5 requires preclearance only of *new* voting practices, but that point does not suggest that Congress intended to bar preclearance only of those new practices that are designed to worsen the electoral position of minorities. Rather, Congress required preclearance of new voting practices because it was concerned that covered jurisdictions might employ new discriminatory practices to frustrate the operation of the Voting Rights Act in the way that they had previously frustrated judicial decrees declaring discriminatory tests and devices to be invalid. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966); *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 567-568 (1969). In addition, if the Act had required preclearance of all state voting practices, even those already in force at the time the Act was passed, it would have caused a much more serious intrusion on state interests, for it would have required each covered jurisdiction to submit its entire election code to the Attorney General or the district court for review and might have suspended elections in those jurisdictions until such a review could have

Appellee objects (Appellee Br. 17) that, under our submission, the purpose and effect prongs of Section 5 are not coterminous; a covered jurisdiction's purpose to accomplish a particular "den[ial] or abridg[ment] [of] the right to vote on account of race or color" would require denial of preclearance, even though a voting change that merely had that incidental effect could be precleared, if it were adopted with a racially neutral purpose and were not retrogressive. It is a familiar principle, however, that "acts generally lawful may become unlawful when done to accomplish an unlawful end." *City of Richmond* v. *United States*, 422 U.S. 358, 379 (1975) (brackets omitted). That principle has played an important role in this Court's jurisprudence construing the Civil War Amendments.[6] It is not surprising, therefore, that a redistricting plan adopted for the purpose of preventing improvement in blacks' voting strength would violate the Constitution and would be denied preclearance under Section 5's purpose prong—even though the same redistricting plan would not be unconstitutional and would therefore not be denied preclearance if it were adopted for valid, racially neutral reasons, and if it had the incidental, nonretrogressive effect of limiting improvement in racial minorities' voting strength. See *id.* at 378 (emphasizing that it may be "forbidden by § 5 to have the purpose and intent of achieving only

been completed. For the same reason, such a requirement would probably have been impracticable.

[6] See *Hunter* v. *Underwood*, 471 U.S. 222, 232-233 (1985) (even if disfranchisement of persons convicted of crimes involving moral turpitude would be valid if enacted for a racially neutral reason, racial motivation rendered it invalid); *Rogers* v. *Lodge*, 458 U.S. 613, 617 (1982) (reiterating that, although multimember districts are not unconstitutional per se, they are invalid if "conceived or operated as purposeful devices to further racial discrimination"); *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347 (1960) (racial motivations invalidated city boundary changes, even if those changes might be permissible if adopted for neutral reasons).

what is a perfectly legal result under that section," because an official action "taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute").

B. The legislative history of the original enactment of Section 5 and its three reenactments confirms that Congress intended to bar implementation of all new voting practices that violate the Constitution because of their purpose to deny or abridge minority citizens' right to vote, and not just those changes intended to erode further the electoral position of minority voters.

We have explained (Opening Br. 20-22) that Congress enacted Section 5 in large part to overcome official resistance to the registration of black voters, in particular ingenious state efforts that had successfully evaded the effect of federal court decrees striking down state voting practices preventing the registration of blacks.[7] Congress was concerned that covered jurisdictions would adopt new devices to freeze the *existing* disparity in voter registration between blacks and whites. See H.R. Rep. No. 439, 89th Cong., 1st Sess. 15-16 (1965); S. Rep. No. 162, 89th Cong., 1st Sess. Pt. 3, at 15-16 (1965) (joint views of 12 members of Senate Judiciary Committee); see also 111 Cong. Rec. 9794 (1965) (remarks of Sen. Hart) ("Section 5 would enable the Attorney General and the courts to insure against changing the laws since November [1964], which would have the effect of *perpetuating* discrimination.") (emphasis added).

Attorney General Katzenbach's summary of litigation under the Civil Rights Act of 1957, which was influential in securing passage of the Voting Rights Act, see *South Carolina* v. *Katzenbach*, 383 U.S. 301, 313-315 (1966), em-

[7] This Court has stressed that Section 5 "must, of course, be interpreted in light of its prophylactic purpose and the historical experience which it reflects." *McCain* v. *Lybrand*, 465 U.S. 236, 246 (1984).

phasized that the new legislation was needed because, despite the Justice Department's "most vigorous efforts in the courts" to secure black citizens' right to vote as guaranteed by the Fifteenth Amendment by challenging discriminatory practices inhibiting black voter registration, "there has been case after case of slow or ineffective relief." *Voting Rights: Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 9 (1965) (*House Hearings*). In summarizing the unsatisfactory outcome of the case-by-case approach and the need for Section 5's preclearance remedy, the House Judiciary Committee stressed: "The judicial process affords those who are determined to resist plentiful opportunity to resist. Indeed, even after apparent defeat resisters seek new ways and means of discriminating. Barring one contrivance too often has caused no change in result, only in methods." H.R. Rep. No. 439, at 10; accord S. Rep. No. 162, Pt. 3, at 5.

Especially in light of the evidence before Congress in 1965 that tests and devices in covered jurisdictions had been highly effective in blocking most black voter participation, it is simply implausible that Congress limited Section 5's purpose prong to bar only new voting practices intended to make matters even worse. Congress was informed, for example, that, in Wilcox County, Alabama, there were *zero* blacks registered to vote (out of a black voting age population of 6085, which was much larger than the white voting age population of 2647), and that similar, exceedingly small numbers of black citizens were registered to vote in numerous counties where discriminatory tests and devices were administered. See S. Rep. No. 162, Pt. 3, at 44-45; *House Hearings* 8, 32-37. Under the logic of appellee's argument, Section 5 had little if any role to play in those counties, because it would have been difficult if not impossible to

cause further diminishment in the voting strength of black citizens there.[8]

The relevant committees, moreover, plainly perceived the function of Section 5 as enforcing the commands of the Constitution's prohibitions against official racial discrimination in voting. The House Judiciary Committee summarized Section 5's operation by stating that a covered jurisdiction "will not be able to enforce [a new voting practice] without obtaining a declaratory judgment that [it] does not have the purpose and will not have the effect of denying or abridging rights guaranteed by the 15th amendment." H.R. Rep. No. 439, at 26. Similarly, the supportive members of the Senate Judiciary Committee stated that "so long as State laws or practices erecting voting qualifications do not run afoul [of] the 15th amendment or other provisions of the Constitution, they stand undisturbed." S. Rep. No. 162, Pt. 3, at 18. No suggestion was made of any limitation to new voting practices intended to cause further encroachments on such constitutional rights.

The legislative records of the reenactments of Section 5 also contradict appellee's submission that Congress intended Section 5 *only* to address retrogression of minority voting strength. When Section 5 was reenacted in 1970 and 1975, the relevant congressional committees emphasized that the preclearance remedy remained necessary because, although black citizens were no longer subject to absolute denials of their right to vote through registration tests, covered jurisdictions had attempted to preempt increased black voting

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[8] When the Voting Rights Act was adopted, only 6.4% of blacks of voting age in the State of Mississippi were registered to vote, whereas 66% of whites of voting age in that State were registered to vote. *House Hearings* 32. Appellee's argument implies that Section 5 was intended to deny preclearance of new registration practices in Mississippi only insofar as those new practices intended or would effectuate a further diminishment in black voting strength.

strength by adopting at-large elections, increasing filing fees, abolishing elective offices, and extending the terms of white incumbents. See H.R. Rep. No. 397, 91st Cong., 1st Sess. 7 (1969); S. Rep. No. 295, 94th Cong., 1st Sess. 17 (1975). In 1975, both the Senate and House Judiciary Committees stated with approval that it was "largely Section 5" that had been responsible for gains in minority voting strength, see *id.* at 19; H.R. Rep. No. 196, 94th Cong., 1st Sess. 11 (1975)—an observation inconsistent with appellee's submission that Section 5 was intended merely to prevent retrogression from gains that minorities might have somehow achieved through other means. See also *City of Rome* v. *United States*, 446 U.S. 156, 182 (1980) (observing that Congress reenacted Section 5 in 1975 to preserve gains achieved "*and* to promote further amelioration of voting discrimination" and "to counter the perpetuation" of pervasive voting discrimination) (emphasis added).

When Congress comprehensively reviewed the enforcement history of Section 5 in 1982 and reenacted it again, the definitive Senate Report did not describe preventing retrogression as the sole function of Section 5. That Report stressed, in fact, that Section 5 had been "designed to insure that old devices for disenfranchisement would not simply be replaced by new ones," S. Rep. No. 417, 97th Cong., 2d Sess. 6 (1982), and that "[c]ontinued progress toward equal opportunity in the electoral process will be halted if we abandon the Act's crucial safeguards [in Section 5] now," *id.* at 10. See also 128 Cong. Rec. 13,288 (1982) (remarks of Sen. Hatch) (favoring continued preclearance because, among other things, "[f]ew would argue that all traces of the discriminatory history that existed in some of the covered jurisdictions have been eradicated"); *id.* at 13,293 (remarks of Sen. Grassley) (observing that "[t]he gains in minority electoral participation achieved through the protections of [Section 5] reflect the success with which it has been

implemented" and "[t]he strength of the act as originally adopted lay in its power to proscribe discriminatory practices as they evolved").

C. These materials demonstrate that the purpose prong of Section 5 has been fundamental to dismantling the massive edifice of official racial discrimination in voting that existed in 1965, has been equally important in preventing the use of new discriminatory devices to perpetuate that discrimination in other guises, and was never intended to be limited to new voting practices that would make matters even worse (especially not worse than they were in 1965). And as we have previously explained (Opening Br. 32-33), in 34 years of administering Section 5, the Justice Department has *never* limited its "purpose" analysis in the administrative preclearance process to an examination of a covered jurisdiction's "retrogressive purpose."[9] Appellee's submission, however, would reduce the purpose prong of Section 5 to a trivial matter, limited to preventing enforcement of those voting changes that are intended to cause retrogression but are destined to fail in doing so (since any new voting practice that actually "will * * * have the effect" of retrogression will be denied preclearance under the effect prong). The Court should reject a construction of Section 5 that would render its purpose prong so insignificant. Cf. *Muscarello* v. *United States*, 524 U.S. 125, 136-137 (1998) (rejecting narrow construction of "carries" in statute punishing one

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[9] Although the Justice Department objects to fewer than 1% of the voting changes submitted for preclearance (see pp. 22-23, *infra*), most of the objections the Department has made on the basis of purpose have been to nonretrogressive voting changes. From January 1, 1990, to July 23, 1999, the Department received 42,596 preclearance submissions, and interposed objections to changes in 367 of those submissions. More than 60% of those submissions were interposed because, even though the changes were nonretrogressive, there was reason to believe that the changes were enacted with a discriminatory purpose.

who "uses or carries" a firearm because, having adopted a narrow construction of "uses," Court could not "also construe 'carr[ies]' narrowly without undercutting the statute's basic objective" and "leaving a gap in coverage that we do not believe Congress intended").

II. A COVERED JURISDICTION BEARS THE BURDEN OF PROVING THAT ITS NEW VOTING PRACTICE DOES NOT HAVE A DISCRIMINATORY PURPOSE

A. The text and legislative history of Section 5, as well as this Court's decisions, establish that jurisdictions covered by Section 5 bear the burden of proving the absence of a discriminatory purpose in their new voting practices.

1. Section 5 provides that, whenever a covered jurisdiction shall enact or seek to administer a new voting practice, the jurisdiction "may institute an action * * * for a declaratory judgment that" the new voting practice does not have a prohibited purpose or effect. 42 U.S.C. 1973c. "[U]nless and until the court enters such judgment" in favor of the covered jurisdiction, the new voting practice may not be enforced. *Ibid.* The statute alternatively permits the jurisdiction to submit the new voting practice to the Attorney General for preclearance, and provides that a new practice "may be enforced * * * if the [new practice] has been submitted * * * to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission." *Ibid.*

Under the litigation framework established by Section 5, the covered jurisdiction must initiate the preclearance action in district court, and may not enforce its new voting changes until that action is resolved. The covered jurisdiction is placed in the position of a plaintiff in a civil action who requests that the court remove a legal impediment applicable to it. Traditionally in civil litigation, the plaintiff bears

the burden of proof in at least its primary sense, *viz.*, the risk of nonpersuasion. See 21 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5122, at 553-557 (1977). Congress is presumed to be aware of such well-established legal principles when it enacts legislation, see *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 185 (1988); *Cannon* v. *University of Chicago*, 441 U.S. 677, 699 (1979), and not to deviate from them absent express indication in the statute, see *Morissette* v. *United States*, 342 U.S. 246, 261-262 (1952). The text of Section 5 therefore places the risk of nonpersuasion in a preclearance action on the covered jurisdiction. See *McCain* v. *Lybrand*, 465 U.S. 236, 257 (1984).

2. The legislative history of Section 5 makes abundantly clear that the covered jurisdiction bears the burden of proof. The placement of the burden of proof on covered jurisdictions was a significant focus of opposition to the Voting Rights Act. During legislative hearings on the Act, Attorney General Katzenbach was questioned several times about the burden of proof and each time confirmed that it would lie with the covered jurisdiction. *House Hearings* 87, 90, 93, 95. Opponents of the bill criticized the preclearance provision because of its "presumption of the irregularity of State voting laws, and the rules, regulations, and resolutions of its subdivisions" and its requirement that a covered jurisdiction "absolve itself of an automatically presumed guilt." H.R. Rep. No. 439, at 43 (views of Republican Judiciary Committee members); see also S. Rep. No. 162, Pt. 2, at 29 (statement of Thomas H. Watkins, submitted by Sens. Eastland, McClellan, and Ervin, criticizing preclearance proposal because covered jurisdictions must "secure[] an adjudication, *with the accompanying burden of proof*," that new voting practices would not discriminate) (emphasis in original).

During Congress's consideration of the first extension of Section 5, several proposals were made to shift the burden of proof to the Attorney General. The House Judiciary Committee rejected such proposals and observed:

> The decision [in *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969)] underscores the advantage section 5 produces in placing the burden of proof on a covered jurisdiction to show that a new voting law or procedure does not have the purpose and will not have the effect of discriminating on the basis of race or color. * * * Failure to continue this provision of the act would jettison a vital element of the enforcement machinery. It would reverse the burden of proof and restore time-consuming litigation as the principal means of assuring the equal right to vote.

H.R. Rep. No. 397, at 8. Members of the Senate, whether supporting or opposing the extension of Section 5, similarly understood it as placing the burden of proof on the covered jurisdiction.[10]

When Congress reenacted Section 5 in 1975, it additionally made clear that it intended the covered jurisdiction to shoulder the burden of proof in both preclearance actions in the district court and in the Attorney General's administra-

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[10] See 116 Cong. Rec. 5518, 5523 (1970) (statement of ten members of Senate Judiciary Committee favoring extension) (noting that "[t]he burden of proving the nondiscriminatory purpose and effect is on the governmental body seeking exemption" and opposing bill reported by Senate Judiciary Committee because it "would shift the all important burden of proof which now rests on the jurisdiction seeking to implement the new practice or procedure"); *id.* at 5677-5678 (remarks by Sens. Ervin, Allen, and Tower); *id.* at 6154 (remarks by Sen. Fong) (among "crucial features of strength contained in section 5" are that "the burden of proof is placed upon the jurisdiction"; "[t]hose who know the law or procedure best and what motivated its passage must come forward and explain it").

tive review of voting changes. The House Judiciary Committee explained that Section 5 "presumes that the change has the purpose or would have the effect of discriminating on the basis of race or color. * * * If no evidence is submitted to overcome the presumption the District Court or the Attorney General must disapprove the change." H.R. Rep. No. 196, at 59.

The Senate Report accompanying the 1982 extension of Section 5 shows that Congress again determined that the covered jurisdiction's burden of proof is central to enforcement of the Fourteenth and Fifteenth Amendments. In describing the proper operation of Section 5's preclearance provisions, the Senate Report stated that "[t]he Attorney General or the [United States District Court for the District of Columbia] was required to withhold approval until the submitting jurisdiction shows that the change will not be discriminatory in purpose or effect. This provision was designed to insure that old devices for disenfranchisement would not simply be replaced by new ones." S. Rep. No. 417, at 6. The Subcommittee on the Constitution described the operation of Section 5 in the same way: "A jurisdiction seeking to preclear a voting change under section 5 has the burden of showing * * * that the voting change under review 'does not have the purpose and will not have the effect of denying or abridging[']' the voting rights of a covered minority group." Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess., *Voting Rights Act: Report on S. 1992*, at 52-53 (Comm. Print 1982). Legislators who opposed the extension of the Act in 1982 criticized Section 5 specifically because it placed the burden of proving the "absence of discrimination" on covered jurisdictions. See S. Rep. No. 417, at 220 (minority views of Sen. East); 128 Cong. Rec. 13,292 (1982) (remarks of Sen. Helms).

3. This Court has consistently held that Section 5 places the burden on the covered jurisdiction to prove the absence of a discriminatory purpose. *City of Pleasant Grove*, 479 U.S. at 469; see J.S. App. 34a-35a, 38a (*Bossier I*); *McCain* v. *Lybrand*, 465 U.S. at 257; *City of Rome*, 446 U.S. at 187; *Georgia* v. *United States*, 411 U.S. 526, 538 (1973); *South Carolina* v. *Katzenbach*, 383 U.S. at 335; see also *City of Petersburg* v. *United States*, 354 F. Supp. 1021, 1027 (D.D.C. 1972), aff'd mem., 410 U.S. 962 (1973).

In those decisions, the Court has identified several reasons why Congress decided to impose the burden on the covered jurisdictions. In *South Carolina* v. *Katzenbach*, the Court explained that, because Congress had found case-by-case litigation to be inadequate to combat persistent discrimination in voting, Congress had decided to "shift the advantage of time and inertia from the perpetrators of the evil to its victims." 383 U.S. at 328. Moreover, the Court stressed, given that covered jurisdictions had previously "resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees[,] * * * there was nothing inappropriate * * * in putting the burden of proof on" covered jurisdictions seeking preclearance. *Id.* at 335.

In *Georgia* v. *United States*, the Court rejected the contention that the burden of proof in the administrative preclearance process must rest with the Attorney General. In that case, Georgia challenged the Attorney General's regulations governing administrative preclearance, which placed the burden of proof on the jurisdiction submitting changes to the Attorney General to show that its new voting practice would not have a prohibited purpose or effect. The Court observed that "[i]t is well established that in a declaratory judgment action under § 5, the plaintiff State has the burden of proof," 411 U.S. at 538, and described the

question before it as whether the Attorney General was obligated to adopt a more lenient approach towards covered jurisdictions in the administrative preclearance process, or, put another way, whether the Attorney General "is without power to object unless he has actually found that the changes contained in a submission have a discriminatory purpose or effect," *id.* at 537. Explaining that "[t]he alternative procedure of submission to the Attorney General merely gives the covered State a rapid method of rendering a new state election law enforceable," *id.* at 538 (internal quotation marks omitted), the Court upheld the Attorney General's regulations because "[a]ny less stringent standard might well have rendered the formal declaratory judgment procedure a dead letter by making available to covered States a far smoother path to clearance." *Ibid.*[11]

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[11] Before this Court's decision on the prior appeal in this case, the Attorney General's regulations provided that the Department of Justice would deny preclearance of a voting change if "a bar to implementation of the change [was] necessary to prevent a clear violation of amended section 2." See 28 C.F.R. 51.55(b)(2) (1996). Of course, this Court's decision on the prior appeal in this case rejected the government's position on that point and made clear that the only effect warranting denial of preclearance is a retrogressive effect. J.S. App. 38a. The regulation quoted above has been repealed. 63 Fed. Reg. 24,108 (1998).

Appellee has pointed out (Appellee Br. 39-40) that, during the period in which that regulation was in effect, the government assumed the burden of proving that a new voting practice should be denied preclearance on the ground that it would "clearly violate" the "results" standard of Section 2. The government's assumption of the burden of proof on that issue reflected its attempt to reconcile, on the one hand, this Court's decisions in *Beer* and *City of Lockhart* v. *United States*, 460 U.S. 125 (1983), which ruled that a nonretrogressive voting change should not be denied preclearance under the effect prong of Section 5, and on the other hand, the legislative history of the 1982 reenactment of Section 5, which indicated that a demonstration of vote dilution sufficient to establish a violation of amended Section 2's "results" standard should lead to denial of preclearance. See J.S. App. 42a; S. Rep. No. 417, at 12 n.31. The govern-

These decisions are consistent with a common-sense approach towards the burden of proof in preclearance cases. Congress was concerned that covered jurisdictions would employ new voting practices to evade the effect of the suspension of discriminatory tests and devices in Section 4 of the Act, 42 U.S.C. 1973b. Congress therefore required covered jurisdictions to show that their new voting practices were not merely attempts to perpetuate racial discrimination by other means. Further, the covered jurisdiction is in possession of most of the information relevant to establishing the validity *vel non* of a new voting practice, including, most pertinently, evidence that would bear on the question of its own purpose. Finally, given that Congress found that the covered jurisdictions had engaged in intentional racial discrimination in voting in the past, it was sensible for Congress to establish, in effect, a presumption that future voting practices enacted by covered jurisdictions would also have a discriminatory purpose, and to require those jurisdictions to demonstrate that such a presumption was rebutted in a particular case.

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ment concluded that it would not be inconsistent with the decisions in *Beer* and *City of Lockhart* to deny preclearance of a nonretrogressive voting change if the government made a showing that the change would "clearly violate" the "results" standard of amended Section 2.

This Court's decision on the prior appeal makes clear that the government's attempt to reconcile amended Section 2's "results" standard with Section 5's "effect" prong was in error, and could not be salvaged by the government's assumption of the burden of proof on the Section 2 issue. Therefore, there is no longer any basis for an argument that the burden of proof in a Section 5 effect case should rest with the government. In addition, where the issue is discriminatory purpose rather than effect, the government has consistently maintained that the burden of proof rests with the covered jurisdiction—a position well supported by this Court's decisions, see pp. 17-19, *supra*—and the government has never assumed the burden of proof on that issue.

B. Although, as we have shown, the burden of proof in preclearance cases is on the covered jurisdiction, it is important not to exaggerate the onerousness of that burden. In the litigation context, that burden means simply that the jurisdiction must establish to the satisfaction of the preclearance court by a preponderance of the evidence that its plan does not have a discriminatory purpose and will not have a retrogressive effect. See *Grogan* v. *Garner*, 498 U.S. 279, 286 (1991) (preponderance-of-evidence standard is presumed to govern in civil cases); see also *City of Petersburg*, 354 F. Supp. at 1027 (in the first Section 5 declaratory judgment action, district court stated that "plaintiff must meet the burden placed upon it by the Voting Rights Act of proving by the preponderance of the evidence that its change" does not violate Section 5). In practical terms, the covered jurisdiction and the United States (and any party permitted to intervene, as in this case) each presents evidence to the preclearance court on the question of the jurisdiction's intent and the voting change's likely effect, and the risk of nonpersuasion falls on the jurisdiction. If the evidence is in equipoise, or if the district court is in doubt about the proper outcome, then preclearance should be denied. See *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121, 138-139 (1997) (where "burden of persuasion [is] on the proponent of an order," and "when the evidence is evenly balanced, the proponent loses"); cf. *O'Neal* v. *McAninch*, 513 U.S. 432, 437-438 (1995).

The Court's decision in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-266 (1977), provides the framework for litigation on the question of purpose in preclearance cases, just as it does in cases in which the burden of proof rests with a party seeking to invalidate state action; the only difference in preclearance cases is that the risk of nonpersuasion in the event of equipoise or doubt falls on the covered jurisdiction. Thus, to

demonstrate the absence of discriminatory intent, the jurisdiction may explain the process by which it decided to adopt the relevant new voting practice. Following *Arlington Heights*, *id.* at 266-268, the jurisdiction may bring forward evidence on the impact of the change, the historical background of the decision, the sequence of events leading to the official action, adherence to nondiscriminatory factors ordinarily considered important by the decisionmaker and to procedures ordinarily followed in imposing its actions, and the legislative history, especially contemporary statements by legislators. Discovery should give the government the opportunity to test those assertions and to obtain any contrary or impeaching evidence. Just as *Arlington Heights* instructs that departures from usual substantive and procedural practices may indicate discriminatory intent, see *id.* at 267, evidence that decisions were taken in conformity with regular procedures and traditional, nondiscriminatory substantive priorities can assist a jurisdiction in demonstrating that a new voting practice lacks an invidious purpose.

In the administrative preclearance process, the Attorney General applies a burden of proof similar to that applied by the preclearance court. See 28 C.F.R. 51.52(a). The history of Section 5 enforcement demonstrates, however, that this burden of proof has not created any undue obstacle to preclearance of covered jurisdictions' new voting practices. Covered jurisdictions continue to choose the administrative process for the vast majority of voting changes; our records show that only 62 declaratory judgment preclearance actions have been filed since Section 5 was enacted. Further, the Attorney General interposes no objection to the great majority of submissions. Although the Department of Justice has received approximately 333,390 voting changes submitted for preclearance review from the Act's enactment to July 22, 1999, the Attorney General has interposed objections to fewer than 1% (3,071) of those changes. The majority of

those objections (about 60% of those made in the 1990s) appear to have been made on the basis of discriminatory, but nonretrogressive, purpose. The fact that the Department has objected to only 3,071 new voting practices in more than 30 years indicates that the Department's preclearance procedures are effective at identifying those voting changes where there is reason to believe that an invidious purpose is afoot without being unduly onerous to jurisdictions. See S. Rep. No. 417, at 49 (Senate report recommending extension of Act in 1982 found that Department does not unduly burden jurisdictions when reviewing changes submitted for preclearance).

Further, the Department's published procedures for preclearance submissions provide jurisdictions with substantial guidance in establishing that their proposed voting changes do not have a discriminatory purpose and will not have a retrogressive effect. The procedural guidance informs jurisdictions of the kind of information that is needed to facilitate the Attorney General's review. See 28 C.F.R. 51.27, 51.28. The procedures are specifically designed to elicit information bearing on the *Arlington Heights* factors for determining whether a new voting practice has been enacted with an unconstitutional, discriminatory purpose.[12] Moreover, when the

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[12] Thus, with regard to the impact of the plan (which this Court has identified as the "important starting point" for discerning invidious discriminatory purpose, 429 U.S. at 266), the Department asks for information about the "anticipated effect of the change on members of racial or language minority groups," 28 C.F.R. 51.27(n), as well as demographic and geographical information about the proposed change, *id.* § 51.28(a) and (b). The Department's procedures also inform jurisdictions that the historical background will be considered when evaluating the submissions. See *id.* § 51.58(b). To evaluate the "sequence of events" leading to the proposed voting change, the procedures explain that the Department will consider whether the jurisdiction followed "objective guidelines and fair and conventional procedures in adopting the change," *id.* § 51.57(b), and the extent to which the jurisdictions afforded members of racial minority

Department receives a submission, it does not immediately proceed to a determination whether the jurisdiction has met its burden of proof or interpose an objection in the event the jurisdiction has failed to submit certain relevant information. When additional information is necessary to complete the review, the Department's practice is to notify submitting jurisdictions of that fact as promptly as possible, and to provide them with the opportunity to supply such additional information before a determination is made. See 28 C.F.R. 51.37(a) and (d).

C. Under the principles discussed above, the district court erred in granting preclearance in this case. To the extent the district court may have considered whether appellee's 1992 redistricting plan lacked a discriminatory (but nonretrogressive) purpose, its analysis of that point is inconsistent with the placement of the burden of proof on appellee. The district court stated that "the record will not support a conclusion that extends beyond the presence or absence of retrogressive intent." J.S. App. 3a. If the record "will not support a conclusion" by the court on the question of a discriminatory but nonretrogressive purpose, however, then the risk of nonpersuasion should fall on the covered jurisdiction, not the government and the intervenors. The district court also stated that it could "imagine a set of facts that would establish a 'non-retrogressive, but nevertheless discriminatory, purpose,' but those imagined facts are not present here." *Id.* at 3a-4a. The question before the district court, however, was not whether the proffered facts established a discriminatory purpose, but whether they established the *absence* of a discriminatory purpose.[13] Any finding made by the district court that appellee acted without a discriminatory purpose, therefore, cannot be sustained on appeal.

groups an opportunity to participate in the decision, *id.* § 51.57(c). The procedures also request evidence of contemporary statements by legislators, by asking the jurisdictions to submit "[m]inutes or accounts of public hearings concerning the proposed change," *id.* § 51.28(f)(3).

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JULY 1999

[13] Moreover, as we have explained (Opening Br. 45; Reply Br. 13), a finding by the district court that appellee did not enact its redistricting plan with a discriminatory, nonretrogressive purpose (if such a finding was in fact made) would be clearly erroneous and could not be squared with numerous other findings made by that court. See J.S. App. 7a (appellee had "tenacious determination to maintain the status quo"; evidence "establishes rather clearly that [appellee] did not welcome improvement in the position of racial minorities with respect to their effective exercise of the electoral franchise"). At a minimum, evidence that appellee purposefully resisted further improvement in black voting strength would rebut appellee's contention that it acted without a discriminatory intent. The district court appears to have evaluated that evidence, however, only to the extent that it might have shown that appellee acted without a *retrogressive* intent. See *ibid.* In addition, on the prior appeal in this case, this Court stated that the district court should consider on remand the government's contention that appellee had violated an injunction to remedy vestiges of its segregated school system. *Id.* at 50a- 51a. The district court's opinion on remand, however, addressed evidence on that point only with respect to retrogressive intent, *id.* at 7a, and not a broader discriminatory intent. Evidence of appellee's violation of a school desegregation decree is surely a fact that would tend to rebut appellee's contention that its 1992 redistricting plan does not have a discriminatory purpose.